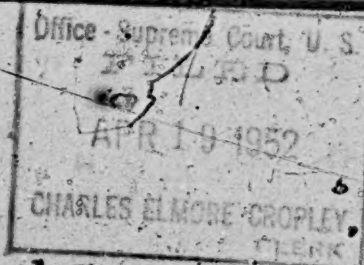


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IN THE



Supreme Court of the United States

OCTOBER TERM, 1951

No. 626

BENNIE DANIELS AND LLOYD RAY DANIELS,
PETITIONERS,

vs.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL
PRISON OF NORTH CAROLINA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT, ROBERT A. ALLEN, WARDEN
OF THE CENTRAL PRISON OF NORTH CAROLINA.

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BRIEF OF RESPONDENT, ROBERT A. ALLEN, WARDEN
OF THE CENTRAL PRISON OF NORTH CAROLINA.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, (R. 323) is reported at 192 F. (2d) 763. The opinion of the District Judge is reported at 99 F. Supp. 208, sub. nom. DANIELS, ET AL. v. CRAWFORD (R. 83).

Opinions of the Supreme Court of North Carolina that deal with this case are reported as follows:

STATE v. DANIELS, 231 N. C. 17, 56 S.E. (2d) 2
(Certiorari)

STATE v. DANIELS, 231 N. C. 341, 56 S.E. (2d) 646
(Coram Nobis)

STATE v. DANIELS, 231 N. C. 509, 57 S.E. (2d) 653
(Appeal dismissed)

STATE v. DANIELS, 232 N. C. 196, 59 S.E. (2d) 430
(Coram Nobis)

On May 8, 1950, this Court denied petitioners' application for a writ of certiorari, and this denial is reported as DANIELS v. NORTH CAROLINA, 339 U. S. 954, 94 L. ed. 1366.

QUESTIONS PRESENTED

1. Where petitioners (Negroes) in State criminal trial raise constitutional issues as to organization of grand and/or petit juries because of alleged racial discrimination, and these issues are determined adversely to petitioners, may a judgment of conviction in State court be challenged collaterally upon these same issues and grounds by a Federal habeas corpus proceeding.

2. Where petitioners in State criminal trial object to admission of confessions on constitutional grounds, alleging brutality, coercion and unlawful detention, and these issues are determined adversely to petitioners after hearing according to State practice, may a judgment of conviction in State court be challenged collaterally upon these same constitutional grounds by a Federal habeas corpus proceeding.

3. If Federal habeas corpus can be used to collaterally challenge a judgment of conviction in a State criminal trial, have petitioners established unconstitutional discrimination in the selection of grand and/or petit juries and that involuntary confessions were admitted in evidence against petitioners.

4. If Federal habeas corpus can be used to collaterally challenge a judgment of conviction in a State criminal trial on grounds that confessions have been unconstitutionally obtained, have petitioners established that the confessions in this case were unconstitutionally obtained and, therefore, should not have been admitted in evidence.

5. Where petitioners have been convicted in a State criminal trial, may the judgment of conviction in State court be challenged collaterally, upon the grounds that the trial judge improperly instructed the jury as to the voluntariness of confessions, by Federal habeas corpus proceeding.

6. Where petitioners have been convicted in a State criminal trial and have right of appeal to highest appellate court of State upon conditions applicable to all persons and races, and petitioners fail to meet such conditions and perfect their appeal, may a judgment of conviction in State court be challenged collaterally by Federal habeas corpus proceeding upon the grounds that petitioners have been unconstitutionally deprived of their right of appeal.

7. When it appears that petitioners have been convicted in a State criminal trial wherein petitioners raised constitutional issues which were determined adversely to them by the trial court, and petitioners failed to perfect their appeal to the highest appellate court of the State which has authority to review such constitutional issues, have petitioners exhausted available State remedies and met the requirements of § 2254 of Title 28 of the United States Code.

8. Whether or not petitioners are seeking, in this case, to use a Federal habeas corpus proceeding as a substitute for an appeal to the highest appellate court of the State.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE JUDICIAL CODE, 28 U.S.C.

"§ 2241. Power to grant writ.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district

court of the district wherein the restraint complained of is had.

* * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

"§ 2254. State custody; remedies in State courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. * * *"

STATUTES OF NORTH CAROLINA

The statutes of North Carolina which respondent considers to be applicable and involved in this case appear in the appendix to this brief (see p. 47).

STATEMENT AND HISTORY OF THE CASE

At the March Term, 1949, the petitioners were indicted by the grand jury of Pitt County, North Carolina, on a charge of murder in the first degree for the killing of William Benjamin O'Neal (R. 33, 303). It was suggested to the trial judge that petitioners "were without counsel and were financially unable to provide counsel," and the Court appointed "Hon. Arthur B. Corey and Hon. W. W. Speight, members of the Bar, in good standing, residing in, and engaged in the practice of law before the Courts of Pitt County" to represent petitioners (R. 304). The petitioners were duly arraigned upon the bill of indictment, and each one entered a plea of "Not Guilty." The trial was continued, and petitioners were sent to the State.

Hospital at Goldsboro for a mental examination by psychiatrists (R. 304).

When the April Term, 1949, of the Superior Court of Pitt County convened, petitioners' mental examinations had not been completed, and the case was continued until the next term or May 30, 1949. At this term (April), however, two attorneys appeared, Herman L. Taylor, of the Wake County Bar, and C. J. Gates, of the Durham County Bar, and stated that they had been employed to represent petitioners. The court then discharged counsel previously appointed, and Mr. Taylor and Mr. Gates were entered of record as counsel for petitioners (R. 305).

When the case was called for trial on May 30, 1949, and after petitioners had already been arraigned and entered pleas of not guilty at a previous term, petitioners for the first time moved to quash the indictment and challenged the array of petit jurors, alleging exclusion of Negroes from the grand and petit juries because of race. The trial judge heard the evidence on these motions, made findings of fact, and overruled the motion to quash and challenge to the array (R. 303, 320).

During the trial, the State offered the confessions of petitioners. The petitioners objected to the introduction of the confessions, and in the absence of the jury, the trial judge heard the evidence of the State and petitioners, according to the North Carolina practice, and found that the confessions had been made freely and voluntarily and allowed the confessions to be used as evidence (Confessions R. 273-276; hearing on confessions: Vol. 1, State Transcript, p. 268).

The jury convicted petitioners of murder in the first degree without recommendation of life imprisonment,¹ and sentence of death was imposed as provided by State law. Judgment was entered on June 6, 1949, and petitioners gave notice of appeal to the Supreme Court in open court and were allowed sixty (60) days from date of judgment to serve statement of case on appeal (G.S. 1-282; appendix p. 47). The State was allowed forty-five (45) days in which to serve exceptions or

¹Under the North Carolina statute (G.S. 14-17; Appendix 52), the jury at the time of rendering its verdict may recommend life imprisonment, and if the jury makes such a recommendation, a sentence of life imprisonment is mandatory. The court must instruct the jury that it has the discretion to make such recommendation.

countercase. On August 6, 1949, counsel for petitioners attempted to serve statement of case on appeal by leaving same in the office of the prosecuting attorney for the State with his secretary. This was not within the sixty (60) days fixed by the court, and the trial judge, upon motion of the prosecuting officer, struck out petitioners' case on appeal (Order of trial judge: R. 277).

Prior to the entry of the order striking out the case on appeal, petitioners applied to the Supreme Court of North Carolina for a certiorari to preserve right of appeal. The Supreme Court of North Carolina dismissed this application on November 2, 1949 (STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2). Petitioners then applied to the Supreme Court of North Carolina for a writ of error coram nobis. The State filed answer, and the Supreme Court of North Carolina dismissed this application on December 14, 1949 (STATE v. DANIELS, 231 N. C. 341, 56 S. E. (2d) 646). Thereafter, upon motion of the State, the Supreme Court of North Carolina dismissed petitioners' appeal (STATE v. DANIELS, 231 N. C. 509, 57 S. E. (2d) 653). Petitioners then applied to this court for certiorari, and this application was denied by this court on May 8, 1950, without dissent (DANIELS v. NORTH CAROLINA, 339 U. S. 954, 94 L. ed. 1366).² Petitioners then applied to the Supreme Court of North Carolina for another writ of error coram nobis, and this application was dismissed on May 24, 1950. (STATE v. DANIELS, 232 N. C. 196, 59 S. E. (2d) 430).

Petitioners then applied to the District Court of the United States for the Eastern District of North Carolina for Federal habeas corpus. The respondent filed answer and motion to dismiss. The proceeding was heard, both sides introducing evidence, and the district judge made findings of fact (R. 77).

² Petitioners in their brief in support of petition for certiorari stated their doubts as to obtaining relief by writ of error coram nobis. Respondent in its brief suggested that the denial was due to procedural rather than substantive reasons. Subsequently the Supreme Court denied another application of petitioners for coram nobis, saying that the writ was not a substitute for an appeal and applied to matters extraneous to the record. (STATE v. DANIELS, 232 N. C. 196, 59 S. E. (2d) 430; See respondent's brief, No. 271, Misc., October Term, 1951, pp. 12, 13, 14)

and discharged the writ and remanded petitioners to the Warden. The opinion of the district judge is reported as DANIELS, ET AL. v. CRAWFORD, 99 F. Supp. 208. (Crawford subsequently resigned as Warden and was succeeded by Allen) The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and the judgment of the District Court was affirmed, Judge Soper dissenting (DANIELS v. ALLEN; 192 F. (2d) 763). Upon application of petitioners, this Court granted certiorari.

FACTS

In attempting to state respondent's version of the facts, we will refer to the Federal Transcript of Evidence as "F.Tr.", and to the four volumes of the State Transcript of Evidence as "S.Tr.". All references will be made to the printed record in this Court where possible.

On February 5, 1949, petitioners, Bennie Daniels and Lloyd Ray Daniels, were seen in Greenville, where Bennie Daniels, armed with a knife, engaged in a fight with the witness, James Henry Riddick (1 S.Tr. 169). Charlie Moore testified that between nine and ten o'clock, petitioners were engaged in fighting and brawling. Bennie Daniels was again observed with a knife (1 S.Tr. 176). At a late hour, petitioners tried to hire the taxicab of Leslie Manning who refused (1 S.Tr. 180). Petitioners were seen by Norman Tripp getting into O'Neal's cab which was parked close to Tripp's cab. The witness Tripp saw O'Neal get into his cab, where petitioners were already seated, and drive off in the direction of Grimesland (1 S.Tr. 182).

O'Neal's body was found by the witness, Leroy Smith, on Sunday morning, February 6, 1949, near some tobacco barns located close to a country road (2 S.Tr. 341). The cab door was open. O'Neal's overcoat was near the door, and the glove compartment of the cab was open. Near the cab was found O'Neal's empty billfold, taxicab permit, picture, papers showing Social Security number and driver's license. O'Neal's whole body showed that he had been slashed, crushed and beaten as if by someone seized with maniacal fury and bloodthirst. Tobacco sticks and bricks with bloodstains were found near O'Neal's body (1 S.Tr. 193; 2 S.Tr. 306; 2 S.Tr. 357; 2 S.

Tr. 430). New and used rubber contraceptives were found at the scene of the crime indicating that this was a place of assignation, but the race of the person using the place for such purposes is not disclosed by the evidence. Rubber contraceptives were found in the watch pocket of Bennie Daniels after his arrest (2 S.Tr. 385, 441).

The overcoat was identified as belonging to O'Neal by his mother and the witness Phillips (2 S.Tr. 325; 2 S.Tr. 356). The woman's glove was shown to have been in the cab before O'Neal received it for driving purposes (2 S.Tr. 353; 2 S.Tr. 355).

The discovery of O'Neal's body was reported to the sheriff (2 S.Tr. 349), and the officers, having been informed that bloody clothes were at the home of Lloyd Ray Daniels and that one of the petitioners had sent word to destroy the clothes, proceeded to search for petitioners. Lloyd Ray Daniels was arrested on Monday morning (February 7, 1949) between one and one-thirty o'clock. He was at the home of one Wilkes on the L. O. Whitehurst farm. He was lying on a cot with his shoes on, fully dressed except his hat. There was cold blood found on the back of his left ear, and scratches around and under his neck with small cuts on his hands (1 S.Tr. 199-200). He was taken in an automobile to Williamston, County seat of the adjoining County of Martin, and placed in jail. While on the way to Williamston, Lloyd Ray Daniels made statements in which he admitted that he helped kill O'Neal and gave some details as to the murder (2 S.Tr. 357; 2 S.Tr. 261).

Petitioner, Bennie Daniels, was arrested Tuesday morning (February 8, 1949) between five and six o'clock in the morning on the Bryan Tripp farm, near the Town of Winterville. When arrested, he was standing behind the door fully dressed (1 S.Tr. 270). He was placed in an automobile, and on the way to Williamston, he admitted that he participated in the killing of O'Neal (2 S.Tr. 355, 356).

On Tuesday night (February 8, 1949), the officer's questioned the petitioners in the jail at Williamston, and written confessions were signed by petitioners (Confessions: R. 273-276; See also 1 S.Tr. 273-276; 1 S.Tr. 276-278; 1 S.Tr. 363-364; See further evidence on confessions: 1 S.Tr. 284, 389, 216, 219, 258, 259, 271, 366, 383-384). As to the confessions, the Court may want to examine the evidence in the Federal Transcript

of Evidence at the reference following: F.Tr. 189, 190; F.Tr. 192, 193; F.Tr. 244-246; F.Tr. 266-267; F.Tr. 270, 271; F.Tr. 285-289; F.Tr. 301-304; F.Tr. 311-314; F.Tr. 319, 320. These various statements and confessions were introduced in evidence against petitioners after the court held a hearing according to the State practice and found the confessions had been made freely and voluntarily (1 S.Tr. 268; R. 272).

While petitioner, Lloyd Ray Daniels, was in the State Hospital at Goldsboro, he made a statement giving the details and describing how he and Bennie Daniels killed O'Neal. This statement was made to a friend of Lloyd Ray Daniels and a social worker, G. M. Johnson, who was attached to the Hospital staff. This statement was certainly obtained voluntarily, and as to this confession, it has never been shown that any coercion, threats or physical violence was used. This confession was not used at the State trial because the State had no information about it until the hearing on Federal habeas corpus in the District Court at Tarboro, North Carolina. See respondent's Exhibit R-2, R. 97 for this confession; see R. 234 for evidence showing circumstances under which this statement was obtained.

ARGUMENT

I.

WHERE PETITIONERS (NEGROES) IN A STATE CRIMINAL TRIAL CHALLENGE ORGANIZATION OF GRAND JURY AND PETIT JURY ON GROUND OF RACIAL DISCRIMINATION AND THE ISSUES ARE DECIDED AGAINST PETITIONERS, A STATE JUDGMENT OF CONVICTION CANNOT BE CHALLENGED COLLATERALLY ON THESE SAME ISSUES, DECIDED BY THE STATE COURT, IN A FEDERAL HABEAS CORPUS PROCEEDING.

In presenting this portion of our argument, we put aside all problems engendered by the revision of the Federal habeas corpus Act (28 U.S.C., §§ 2241, 2254, pp. 3, 4). We assert that where a State judgment of conviction in a criminal trial is collaterally attacked by a civil proceeding such as Federal habeas corpus, then errors committed in the State court in

the constitution of the State grand and petit juries are considered as irregularities. These issues having been raised in the State trial and decided adversely to petitioners cannot be retried by the device of Federal habeas corpus. The fact that the issues involved relate to alleged violations of the Federal and State Constitutions does not change the principle.³ These errors, if they exist, are matters to be reviewed on appeal in the State court and do not destroy the jurisdiction of the State court when the State trial is called into question on Federal habeas corpus.

The Superior Court of Pitt County is a State court of general jurisdiction (G.S. 7-63; Appendix p. 53) and has jurisdiction over the crime of murder as defined (G.S. 14-17; Appendix p. 52) by the State statute. The questions of racial discrimination in the selection of grand and petit jurors were raised by petitioners on motion to quash the indictment and challenge to the array or panel of trial jurors. Putting aside the effect of the time of making the motion to quash, this was the correct procedure (STATE v. SPELLER, 229 N. C. 67, 47 S.E. (2d) 537; STATE v. KORITZ, 227 N. C. 552, 43 S.E. (2d) 77) according to State practice for the presentation of such questions. Under the State practice, the questions raised by these motions are heard by the trial judge (STATE v. HENDERSON, 216 N. C. 99, 3 S.E. (2d) 357; STATE v. BELL, 212 N. C. 20, 192 S.E. 852; STATE v. WALLS, 211 N. C. 487,

³ GLASGOW v. MOYER, 225 U.S. 420; 56 L.ed. 1174

U.S. Ex REL. ROGALSKI v. JACKSON, 2 Cir., 146 F. (2d) 251, 256

U.S. EX REL. MURPHY v. MURPHY, 2 Cir., 108 F. (2d) 861, 862

EURY v. HUFF, 4 Cir., 141 F. (2d) 554, 555

GRAHAM v. SQUIER, 9 Cir., 132 F. (2d) 681

In the case of GRAHAM v. SQUIER, *supra*, the Circuit Court explains what it considers to be the exact decision or meaning of BOWEN v. JOHNSTON, 306 U. S. 19, 83 L. ed. 455.

⁴ The Court will see from the State Transcript that while ratios between white and colored populations and tax lists were shown, the petitioners' attempts to show discrimination were confined to colored witnesses who said they were eligible for jury duty but had never been called. The State showed the same situation by white witnesses as to white jurors. The jury boxes were produced and the scrolls examined, but petitioners never attempted to show the number of names of Negroes appearing on the scrolls in the jury boxes.

191 S.E. 232) and upon findings of fact, a decision is rendered. There was considerable evidence⁴ on these motions introduced by both sides (1 S.Tr. 2-167) and the trial judge overruled petitioners' motions (R. 303-320, 4 S.Tr. 1-22) upon findings of fact shown in the record. All of these questions are subject to review by the Supreme Court of North Carolina (STATE v. SPELLER, 229 N. C. 67, 47 S.E. (2d) 537) had the petitioners seen fit to perfect their appeal. One Negro served on the trial jury that convicted petitioners.

Under these circumstances, we think the decisions of this Court and the Circuit Courts support the principle that a review of these questions is not available to the petitioners who are seeking to collaterally attack a judgment rendered in a State criminal trial by Federal habeas corpus. Having in mind that our argument at this point is focused on jury problems solely, we cite and rely upon certain cases as follows:

- IN RE WOOD, 140 U.S. 278, 35 L.ed. 505
- JUGIRO v. BRUSH, 140 U.S. 370, 35 L.ed. 511
- ANDREWS v. SWARTZ, 156 U.S. 272, 39 L.ed. 422
- KAIZO v. HENRY, 211 U.S. 146, 53 L.ed. 125
- IN RE WILSON, 140 U.S. 575, 35 L.ed. 513
- CARRUTHERS v. REED, 8 Cir., 102 F. (2d) 933
- HALE v. CRAWFORD, 1 Cir., 65 F. (2d) 739
- EURY v. HUFF, App. D.C., 146 F. (2d) 17
- SCHOLZ v. SHAUGHNESSY, App. D.C., 180 F. (2d) 450
- U. S. EX REL. McCANN v. THOMPSON, 2 Cir., 144 F. (2d) 604
- U. S. EX REL. JACKSON v. BRADY, D.C., Md., 47 F. Supp. 362
- EX PARTE CEASAR, D.C., Texas, 27 F. Supp. 690
- JOHNSON v. WILSON, D.C., Ala., 45 F. Supp. 597
- (Affirmed JOHNSON v. WILSON, 5 Cir., 131 F. (2d) 1)
- EX PARTE MURRAY, 66 Fed. Rep. 297
- STATE EX REL. PASSER v. COUNTY BOARD, 52 A.L.R. 916 (Minn.), Note p. 929

In respondent's brief filed in this Court opposing application for certiorari (DANIELS v. ALLEN, No. 271, Misc.—October Term 1951) and in our brief filed in the United States Court of Appeals for the Fourth Circuit (DANIELS v. AL-

LEN, No. 6330), we quoted from these cases, and we refer the Court to these briefs.

We are aware of the cases cited by petitioners wherein this Court has held (ROSS v. TEXAS, 341 U. S. 918, 95 L. ed. 1352; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074; PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757; PATTON v. MISSISSIPPI, 332 U. S. 463, 92 L. ed. 76; CASSELL v. TEXAS, 339 U. S. 282, 94 L. ed. 839 and many other cases) that convictions in State courts should be reversed because Negroes were purposefully discriminated against in the selection of grand and/or petit juries. These cases, however, do not oppugn the principle for which we are contending. These cases came before this Court on writs of certiorari directed to the highest appellate courts of the States concerned, and the constitutional issues were thus reviewed directly and not by a collateral attack procedure.⁵ Later on, we will discuss the evidential circumstances and merits relating to the issue of the selection of the grand and petit juries in this case.

II.

PETITIONERS HAVING OBJECTED TO THE INTRODUCTION OF THEIR CONFESSIONS IN STATE CRIMINAL TRIAL ON GROUNDS THAT CONFESSIONS HAD BEEN PROCURED BY UNCONSTITUTIONAL METHODS, AND HAVING BEEN HEARD ON THIS OBJECTION ACCORDING TO STATE PRACTICE AND THE ISSUE RESOLVED AGAINST THEM, STATE JUDGMENT OF CONVICTION CANNOT NOW BE CHALLENGED COLLATERALLY BY PETITIONERS, ON THIS SAME ISSUE, BY FEDERAL HABEAS CORPUS PROCEEDING.

Independent of and aside from any question of the exhaustion of State remedies, where State rulings on the ad-

⁵ The case of SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982, considered only Federal procedure and principles in the use of habeas corpus, but it is interesting to note that in the opinion of the Court, as well as in the dissenting opinion, the rule is approved that questions as to the constitution of juries are treated as irregularities that do not destroy the jurisdiction of the Court when such questions are presented by habeas corpus procedure.

missibility of confessions are examined on Federal habeas corpus any alleged errors relating thereto are viewed as matters of evidence subject to correction on State appeal. Where a collateral attack is made on a State judgment in a criminal trial, the fact that the objection to a confession is portrayed as constitutional confers no authority to expand the measure or standard of such review. Petitioners' whole brief implies that if you can magnify any question raised in a State criminal trial to a semblance of constitutional relationship, then Federal habeas corpus in an expanded form becomes immediately available to convert the Federal judiciary into appellate courts to review State action.

A polemical essay on the exclusion of confessions extorted by brutality and coercion would be entirely irrelevant in this discussion. This Court, in a series of decisions, has settled such questions, and the cases cited by petitioners are well known to the legal profession.⁶ These cases were considered by this Court on direct review by writs of certiorari directed to the highest appellate courts of the States involved. No doubt, the petitioners could have availed themselves of this method of review had they seen fit to exercise any reasonable promptitude in pursuing their right of State appeal or had they seen fit to retain the attorneys first assigned to them by the State.

In the State trial, both sides offered evidence (R. 74-122; F. Tr. 187ff, 238ff, 243ff, 254ff, 260ff, 284ff, 300ff, 311ff; See also evidence of these same witnesses in State Transcript) as to how the confessions were procured. On this point, the evidence was elicited in the absence of the jury. Under the North

* BROWN v. MISSISSIPPI, 297 U. S. 278, 80 L. ed. 682; CHAMBERS v. FLORIDA, 309 U. S. 227, 84 L. ed. 716; MALINSKI v. NEW YORK, 324 U. S. 401, 89 L. ed. 1029; WATTS v. INDIANA, 338 U. S. 49, 93 L. ed. 1801; TURNER v. PENNSYLVANIA, 338 U. S. 62, 93 L. ed. 1810. Petitioners also cite other cases to the same effect.

We do not consider that cases such as VON MOLTKE v. GILLIES, 332 U. S. 708, 92 L. ed. 309, have any reasonable application when applied to State action. The VON MOLTKE case originated in a Federal court. No State ruling was involved. We do not see how the States could have any possible complaint as to the procedural scope of habeas corpus which this Court grants to the lower Federal courts in Federal cases.

Carolina practice, the trial judge determines (STATE v. WHITENER, 191 N. C. 659, 132 S.E. 603; STATE v. ROGERS, 216 N.C. 731, 6 S.E. (2d) 499; STATE v. DICK, 60 N. C. 440) as a preliminary question, whether or not the confession was voluntary in character and should be, or not be, submitted to the jury.

In the State trial, petitioners had an ample opportunity to be heard and introduce all the evidence they desired. On this aspect of the case, the same method and practice was employed by the trial judge as is utilized in considering the confessions of white persons, and this has been the practice in the North Carolina courts for many decades.

The present status of the decisions supports our position that these issues having been adjudicated in the State court, petitioners cannot now retry these same issues by collateral attack on the State judgment through the instrumentality of Federal habeas corpus.⁷ COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692; HARLAN v. MCGOURIN, 218 U. S. 442, 54 L. ed. 1101; SMITH v. U. S., 187 F. (2d) 192 (D.C. Cir.); MILLER v. HIATT, 3 Cir., 141 F. (2d) 691; SCHRAMM v.

⁷ COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692.

"It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

PERRY v. HIATT, D. C., App. 33 Fed. Supp. 102.

"Relator's argument that because he had a mistaken idea of the nature of the offense charged and was thereby misled into making a false confession, raises a question which this court cannot consider in habeas corpus proceeding. Widener v. Harris, 4 Cir., 60 F. 2d 956."

EURY v. HUFF, App. D. C., 146 Fed. (2d) 17.

"Assuming the petition means that an involuntary confession was actually received in evidence, still that question could not be retried by the procedure of habeas corpus. Sufficiency of the evidence to support a conviction is not jurisdictional and is not open to review in habeas corpus proceedings."

BRADY, 4 Cir., 129 F. (2d) 109; BURRALL v. JOHNSTON, 9 Cir., 134 F. (2d) 614; SNELL v. MAYO, 5 Cir., 173 F. (2d) 704; EURY v. HUFF, App. D. C., 146 F. (2d) 704; WALLACE v. HUNTER, 10 Cir., 149 F. (2d) 59; SMITH v. LAWRENCE, 5 Cir., 128 F. (2d) 822; MASSEY v. HUMPHREY, D. C. Pa., 85 F. Supp. 534; U. S. v. LOWREY, D. C. Pa., 84 F. Supp. 804; U. S. EX REL. v. HIATT, D. C. Pa., 33 F. Supp. 1002; U. S. EX REL. HOLLY v. PA., D. C. Pa., 81 F. Supp. 861 (Affirmed 3 Cir., 174 F. (2d) 480).

III.

PETITIONERS HAVE NOT SHOWN THAT PERSONS OF THEIR RACE WERE ARBITRARILY, INTENTIONALLY AND SYSTEMATICALLY EXCLUDED IN THE SELECTION OF THE GRAND JURY AND PETIT JURY.

The petitioners were arraigned at the March Term, 1949, of the Superior Court of Pitt County, and at this same term, they entered a plea of not guilty (R. 304). At the same term of the Superior Court, the judge appointed W. W. Speight and Arthur Corey, both residents and members of the Bar of Pitt County, to represent the petitioners.⁸ At the April Term of the Superior Court of Pitt County, Mr. Gates and Mr. Taylor presented themselves to the court and said they had been retained to represent the petitioners, and the court, therefore, discharged counsel previously appointed and entered Mr.

⁸ These attorneys lived in Pitt County and were well acquainted with persons likely to be called for jury duty. W. W. Speight was an experienced criminal lawyer and had had considerable experience in the office of the Attorney General of the State. Arthur Corey had lived all of his life in Pitt County and was a good trial lawyer. He had served in the State Senate for a number of years and had traveled all over the County many times in political campaigns. These attorneys did not think that it was to the best interest of petitioners to attempt to quash the bill of indictment and challenge the array or trial panel for reasons of alleged racial discrimination (R. 223ff). Petitioners preferred, however, to accept the services of two attorneys, one of whom was a member of the Wake County Bar, and another of the Durham County Bar, who resided a considerable distance from Pitt County and who, so far as this record shows, had not previously practiced in Pitt County.

Gates and Mr. Taylor as counsel for petitioners. When the trial began at the May Term, 1949, petitioners, for the first time, made a motion to quash the bill of indictment for racial exclusion of colored people from the grand jury and entered a challenge to the array as to the petit jury for the same reason (1 S.Tr. 167). The court heard the evidence offered by both sides on these motions (1 S.Tr. 2-167), made findings of fact (R. 303) and overruled both motions (R. 320). According to the State practice, a motion to quash a bill of indictment must be entered before the persons indicted plead to the bill of indictment. If the motion to quash is made after arraignment and plea of not guilty have been entered, the allowance of the motion is in the discretion of the court.⁹ In overruling these motions, the ruling of the court was based both upon the merits and in the exercise of the court's discretion (1 S.Tr. 167). It is not contended by petitioners that the persons who actually served on the grand jury which indicted them were not eligible grand jurors. Therefore, under these circumstances, the petitioners have waived any right to make any objection to the selection of the grand jury or to quash the bill of indictment for reasons of racial discrimination. The motion not having been made in apt time according to State practice, all rights to quash the bill for these reasons are waived, and this contention has the support of one Circuit Court in a situation almost identical.¹⁰

⁹ STATE v. BURNETT, 142 N. C. 577, 55 S. E. 72; STATE v. BEAL, 199 N. C. 278, 294, 154 S. E. 604, 613; STATE v. BREWER, 180 N. C. 716, 717, 104 S. E. 655, 656.

¹⁰ CARRUTHERS v. REED, 8 Cir., 102 F. (2d) 933:

"But the record in this case discloses that the attorney, Mr. Adams, in conducting the defense for the appellants, was fully advised and gave careful consideration to the fact that negroes had been and were excluded from the jury panels. He was also familiar with the decision of the Supreme Court affirming the rights of the appellants under the equal protection clause of the Federal Constitution on account of the exclusion of persons of their race from the jury panel. He considered whether or not he should raise the point by motion to quash the panel and decided, after deliberation, not to do so. From the record it appears that this decision was influenced by two considerations: First, it might prejudice his clients; and secondly, he seems to have felt that the jury panel was favorable, that is, as he expressed it, 'a very good jury.' * * *

As we have pointed out before, the petitioners, in attempting to show racial discrimination, followed the plan or system of introducing many colored witnesses who testified as to their qualifications to serve on juries and further that they had never been called for jury service. To controvert this method of showing discrimination, the State introduced many white witnesses who testified that they too were qualified for jury duty and had never served on any jury. The jury boxes were brought into court and examined, but petitioners never attempted to show the number of Negro jurors appearing on the scrolls in the boxes (R. 312). It was admitted by both sides that the jury boxes of the County contained the names of approximately 10,000 persons of both the white and colored race. It appeared before the trial judge that the population of Pitt County was 61,244 persons, of which 32,151 belonged to the white race and 29,086 belonged to the colored race (R. 134ff). The evidence before the State court was to the effect that 17,323 persons of the white race were over twenty-one years of age, and 13,762 persons of the Negro race were over twenty-one years of age. The list of names on the tax records for 1946 would be the applicable year from which names would be selected; on this tax list were 15,517 names, and of these 10,344 were white persons, and 5,773 were colored. In 1945, there were 14,368 names listed, of which 9,466 were white, and 4,902 were colored. In 1947, there were 16,455 names listed, of which 10,894 were white, and 5,561 were colored. In 1948, there were 16,926 names listed, of which 11,193 were white, and 5,733 were colored. The tabulation as to the various years will be found in 4 S.Tr. 141, 142. It was found as a fact by the court (R. 307) that prior to 1947, no Negro had served on the grand jury in Pitt County in more than twenty years but that prior to 1947, members of the

"Under the law of Arkansas a challenge to the panel or motion to quash must be promptly made and it is too late if the jury has been empanelled and sworn. *Brown v. State*, 12 Ark. 623 (See 35 C. J. 372). If no objection was made at the trial, it is too late to urge it for the first time after verdict.

"The right to challenge the panel is a right that may be waived and is waived if not seasonably presented. Such rights, if waived during trial, may not be availed of by attack, in a collateral proceeding. *Bracey v. Zerbst*, 10 Cir., 92 F. 2d 8."

Negro race had been occasionally called and had served apparently on the trial jury.

In the year 1947, all jury boxes of the County were purged, and all names appearing on the jury scrolls were destroyed. A new list of names was prepared from the tax lists and other sources, and nothing appeared on these lists or scrolls which indicated whether they were persons of the white or Negro race. The County Attorney met with the Board of Commissioners and advised the Commissioners that under the rulings of the Supreme Court of the United States and the State Supreme Court, eligible Negroes could not be excluded from the jury list (R. 280; 1 S.Tr. 122, 123).¹¹ The members of the Board of Commissioners testified as to how they made up the list and the details as to the preparation (1 S.Tr. 112ff; R. 283ff).

In 1945, the General Assembly of the State passed a public-local act which staggered the period of service of members of the grand jury, the system providing that after the first day of July, 1945, a regular grand jury should be chosen and that the first nine members of this grand jury should serve for a term of one year and the second nine members should serve for a term of six months, and thereafter, at the first term of the criminal court after the first days of January and July of each year, there would be chosen nine members of the grand jury to serve for a term of one year (R. 315).

It will thus be seen that although the grand jury which indicted the petitioners did not contain any colored persons,

¹¹Sam Underwood, County Attorney, testified (R. 280):

"Q. I wish you would state what you did with the board of commissioners if you met with them, and what advice you gave them with reference to the drawing of the jury in June, 1947, when a new list was made up for the odd year?

A. Well, sir, it was in that year that the effect of the amendment regarding women serving on juries was to be felt. After a conference with your office about the matter of women serving on the juries I met with the commissioners, discussed that phase of it with them and pointed out to them the import of the decision of the Supreme Court of the United States with regard to negroes serving on juries in North Carolina and advised them that they should take every precaution to see that no negro was excluded, since they were going to revise the jury list anyway to go ahead and prepare it absolutely in accordance with the law."

nine names were drawn according to the statute and from a box that contained the names of both white and colored. All names were drawn from the whole panel of jurors by a child under ten years of age as required by the statute (4 S.Tr. 16). It was furthermore found by the court as a fact, and the evidence supports the finding, that members of the Negro race have been drawn for jury duty at practically every term of the Superior Court since the box was purged in July, 1947 (4 S.Tr. 17). A venire of 150 jurors was ordered by the court for the trial of this case for the purpose of supplementing the panel of regular jurors. Of these names drawn, five members were of the Negro race, and out of the total number of persons actually summoned by the Sheriff, two were Negroes, and of these two, one served upon the jury which tried these petitioners (4 S.Tr. 17).

In 1 S.Tr. 72, 73, there will be found a list containing the number of jurors summoned for jury duty from August, 1945, on through the May Term, 1947. The clerk to the Board of Commissioners also appended an affidavit (1 S.Tr. 73) showing the number of Negroes who were drawn for jury duty at each term. It should be carefully noted that there might have been more Negroes drawn at all of these terms, but from his knowledge, not less than the number set forth was drawn.

Both the petitioners and the State offered as witnesses several persons from each race who testified that they had never served on any jury in Pitt County although they were apparently eligible. It will be seen that a great many of these persons were ministers or undertakers, and by reason of their occupation were automatically excused from jury duty by the statute. A copy of the statute appears in the appendix. The testimony as to the white persons who have never served on a jury in the county begins in 1 S.Tr. 74, et seq.

In view of the fact that the jury box was purged in the year of 1947, the Board of Commissioners was advised by the County Attorney that under the rulings of this Court, eligible Negroes could not be excluded and in view of the evidence of the Commissioners, clerk to the Board of Commissioners, and others connected with the jury system. (R. 281-302), we do not think that "purposeful" and "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS

v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074) has been shown by petitioners. At least, the most that has been shown is that the county authorities administering the jury selection system did not select and put in all of the Negroes that the petitioners, with their idealistic concepts, think should have been selected and put in. The fact remains, that Negroes, since 1947, have begun to serve on the juries in Pitt County.¹² On the trial venire in this case, five Negroes were summoned, but two had died since the names had been put in the jury box in 1947, one had moved out of the county, and two were summoned and reported for duty. One of these disqualified herself by disclosing that she had conscientious scruples against capital punishment. The other one was accepted and served on the trial jury (R. 316, 317). If the rule is still in force (THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512) that great weight will be given to the determination of the trial court, actually present and able to see and hear the witnesses and

¹²On this point, Sheriff Tyson, who attends most of the courts, testified (R. 287):

"Q. You are in court practically every court?

A. Most every court. We have had a few criminal courts when I was sick and been so I didn't attend.

Q. Do members of the negro race serve, drawn and are in court at practically every term of court?

A. Most every term of court there are some.

Q. Are there as many as several on each panel?

A. I don't know what court but I remember one court this year that I have seen as many as four sitting on one case.

Q. Have you seen negroes sitting in the box on a jury when white defendants were being tried?

A. Yes, sir, I have.

Q. And I ask you if you didn't see that before the Daniels case was tried?

A. Yes, sir, I have.

Q. And since?

A. Yes, sir.

Q. And I ask you whether or not you have seen me as solicitor leave them on the jury?

A. Lots of times.

Q. Court after court?

A. Yes, sir.

Q. And in case after case?

A. Yes, sir, lots of times."

evaluate their truthfulness and deportment, then the careful findings of fact made by the trial judge are correct and should not be disturbed by collateral attack through the instrumentality of Federal habeas corpus.¹³ Certainly this matter should be weighed and considered according to the way it appeared before the trial judge. It is grossly unfair to the State court for a case to be presented according to a certain theory by the counsel who then has control of the development of the case and to be passed upon and judged upon that basis, and then after the record is carefully studied by other counsel representing petitioners, and after the county has been searched over for any shred of evidence that would show discrimination, the State trial judge, the prosecuting officer, the jury authorities, and, indeed, the whole county and its officers are tried and condemned by Federal habeas corpus upon entirely new evidence.¹⁴ The district judge, when he reviewed

"In *THOMAS v. TEXAS*, *supra*, on State trials dealing with jury discrimination, this Court thought certain rules should be applied:

"The only contention was that the jury commissioners in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error did in fact exclude therefrom negroes or persons of African descent, because of their race and color. This was a question of fact, and the ordinary rule is that questions of fact will be reviewed by this court on writs of error to state courts.

"As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

"The decisions on habeas corpus, as in many other respects, do not give any reasonable degree of certainty as to the scope of the

the action of the trial judge, considered that the trial judge's findings of fact and decision were correct (R. 77, 82, 91, 92). The United States Court of Appeals for the Fourth Circuit disposed of the case (R 323) on principles relating to the scope of Federal habeas corpus in reviewing the action of State courts.¹⁵ In a case like this where one of the issues is racial discrimination in the selection of grand and petit juries, one of the first questions that is always asked pertains to the ratio between the population of the white and colored races in the governmental unit under consideration. The courts have always said, both State and Federal, that fairness in the selection of jurors has never been held to require proportional

evidence on Federal habeas corpus hearing involving action of State courts. In one case (FRANK v. MANGUM, 237 U. S. 309, 59 L. ed. 969), we are told that: "A prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him." This should be compared with the principle (JOHNSON v. HOY, 227 U. S. 245, 57 L. ed. 497; U. S. v. MULLIGAN, 2 Cir., 67 F. (2d) 321, 323) that the writ of habeas corpus cannot be used to enlarge the record and show additional grounds of defense and further the principle that the writ of habeas corpus cannot be used to amplify the record (KELLY v. RAGEN, 7 Cir., 129 F. (2d) 811, 813) by bringing in newly-discovered evidence.

"It is true that Judge Soper of the Court of Appeals, dissented in this case (R. 334). Judge Soper concluded that in comparison with the ratio of Negro population to white population, the Negroes serving on the jury were too few in number. He compared 44.2% of Negroes over twenty-one years of age with literacy rate of 74.2% with 2% of Negroes on the jury list and less than 1% of the petit jurors consisting of Negroes. However, in the case of U. S. v. BRADY, 133 F. (2d) 476, the service file of jurors in the City of Baltimore consisted of 18,901 white, and 653 colored persons. At the time of the trial, there were seven panels of 25 each in the courts of Baltimore containing eight Negroes out of a total of 175 men. The grand jury had always contained one colored juror. Judge Soper, in writing the opinion of the Court in this case, decided that this ratio was all right and that "no discrimination can be found, even when attention is confined to comparative percentages alone, and the number of Negroes drawn for the juries in Baltimore from the established service list."

representation of races upon any jury. See *AKINS v. TEXAS*, 325 U. S. 389, 89 L. ed. 1692; *VIRGINIA v. RIVES*, 100 U. S. 313, 25 L. ed. 667; *THOMAS v. TEXAS*, 212 U. S. 278, 53 L. ed. 512; *FAY v. NEW YORK*, 332 U. S. 261, 91 L. ed. 2043. Where we constantly find this factor emphasized so that it almost becomes the dominant or major factor in such a consideration, we wonder if the courts have not unconsciously adopted the rule of proportional representation of races on juries in spite of the many judicial utterances to the contrary.¹⁶

We call the Court's attention to the fact that in *AKINS v. TEXAS*, 325 U. S. 398, 89 L. ed. 1692, the commissioner testified that they had no intention of placing more than one Negro on the panel, and yet this Court found no discrimination in the selection of the jurors.¹⁷

¹⁶As an example of a State court (*SWAIN v. STATE*, 215 Ind. 259, 18 N.E. (2d) 921, 926), we find the following: "It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

In *FAY v. NEW YORK*, *supra*, the constitutionality of a "blue ribbon" jury in New York was upheld; this jury was apparently selected from a panel of 150 which contained the names of no Negroes. This Court pointed out: "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough * * * even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution."

¹⁷"Commissioner Wells: There was nothing said about the number and nothing was said about the number on the panel. . . . We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury. . . . Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. . . . Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

In view of the fact that there is also a legal presumption that administrative officials, in preparing a jury panel, will be presumed to perform their duty fairly and justly without discrimination against any race or class (*TARRANCE v. FLORIDA*, 188 U. S. 519, 47 L. ed. 572), we do not think that purposeful and intentional exclusion of colored jurors from the grand and petit jury has been shown in this case.

IV.

THE CONFESSIONS OF PETITIONERS WERE PROPERLY ADMITTED IN EVIDENCE AND WERE NOT PROCURED IN VIOLATION OF THE FOURTEENTH AMENDMENT.

During the trial in the State court, the State introduced in evidence certain confessions of the petitioners (R. 96-98), and petitioners raised the issue as to whether or not these confessions were obtained by force and coercion contrary to the Fourteenth Amendment. In accordance with the North-Carolina practice, the trial judge excused the jury and conducted a hearing for the purpose of determining whether or not the confessions were voluntary and should be admitted in evidence or excluded.¹⁸ The facts that render a confession involuntary, the admissibility of the evidence to establish such facts and the existence of evidence to support a finding as to admissibility (*STATE v. CROWSON*, 98 N. C. 595, 4 S. E. 143) are questions of law subject to review. The weight of the evidence and the credibility of the witnesses offered to

"Commissioner Tennant: 'We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on.'

"Commissioner Douglas: 'Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right.'"

¹⁸That this procedure is in accordance with North Carolina practice, see *STATE v. WHITENER*, 191 N. C. 639, 132 S. E. 603; *STATE v. ROGERS*, 216 N. C. 731, 6 S. E. (2d) 499; *STATE v. DICK*, 60 N. C. 440.

prove or disprove such facts are matters for the trial judge and will not be reviewed. See *STATE v. GRASS*, 223 N. C. 31, 25 S. E. (2d) 193; *STATE v. GOSNELL*, 208 N. C. 401, 181 S. E. 323. If the confession is admitted in evidence, its weight is for the jury (*STATE v. HARDEE*, 83 N. C. 619; *STATE v. HENDERSON*, 180 N. C. 735, 105 S. E. 339), and the jury may believe the confession or not, and the jury is the judge of its sufficiency to prove the fact confessed. The States use different methods to test the voluntariness of a confession (*STATE v. CRANK*, 170 A.L.R. 542, Anno., p. 567), and North Carolina is included in the twelve States that use this same method. If the method used gives opportunity for notice and hearing and other fundamentals of fairness, the State can use its own method of determining the voluntariness of confessions, and no question arises under the due process or the equal protection of the law clause of the Fourteenth Amendment.¹⁰

The petitioner, Lloyd Ray Daniels, was arrested between 1:00 and 1:30 o'clock in a tenant house on a farm. He was found lying on a bed or cot fully dressed, with his shoes on and all of his clothes except his hat. Blood was found behind his left ear and scratches under his neck and cuts on his hands. There were five officers present with the Sheriff (B. 50) when he was arrested. The officers had proceeded only a short distance when he began to tell about the crime and how it was committed (R. 51), and he was carried in an automobile to Williamston, in Martin County. He was warned by the

¹⁰*LISENBA v. CALIFORNIA*, 314 U. S. 219, 86 L. ed. 166:

"Tests are invoked to determine whether the inducement to speak is such that there is a fair risk that the confession is false. These vary in the several States. This court has formulated those which are to govern in trials in the federal courts. The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rules as she elects, whether it conform to that applied in the federal or in other state courts."

To the same effect, see *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481 and *WARD v. TEXAS*, 316 U. S. 547, 86 L. ed. 1663. The method used in this case for determining the voluntariness or competency of confessions has been the practice in North Carolina for many decades.

Sheriff that anything he said would be used against him.²⁰ Lloyd Ray Daniels was lodged in jail in Williamston, in Martin County, for safekeeping, and if the Court will examine the evidence in the whole State Transcript, it will be found that he never, at any time, asked to be allowed to see any of his relatives and that he never testified on the State trial that he be allowed to see his mother. For the first time during the hearing on the Federal habeas corpus proceeding, he testified that when he was put in jail in Williamston, he had asked to see his mother and had been refused (R. 144). This was denied by officer Gibbs (R. 246). On the State trial and at the Federal hearing, Lloyd Ray Daniels testified that officer Gibbs told him

Sheriff Tyson testified:

"Q. Did anybody offer him any violence?"

A. No, sir.

Q. Anybody attempt to?

A. No, sir.

Q. Anybody make any threats?

A. No, sir.

Q. Anybody offer him any inducements?

A. No, sir.

Q. State whether or not he was warned or anything said to him with respect to what he said would be used against him?

A. Yes, sir, I warned him and told him he didn't have to make a statement, that any statement he did make would be used against him in court.

Q. When was that?

A. After he got in the car."

S. G. Gibbs, highway patrolman, testified (R. 242, 243, 244, 245):

"Q. Did you talk with Lloyd Ray?

A. Yes, started towards Williamston with him.

Q. You recall whether Sheriff Tyson said anything to him?

A. We started questioning him as to where he was on Saturday night. Sheriff Tyson told him when we started questioning him he didn't have to make any statement, that anything he said could be used against him, or words to that effect.

Q. It is in evidence in the former trial when the petitioners testified, and at this hearing, that you made certain statements and threats to the petitioner, Lloyd Ray Daniel, had your hand on your pistol and made certain threats to shoot him if he didn't tell what you wanted him to tell, and it is also in evidence that you told him if he wanted to see his mother again, or he would never see his mother again. Tell the Court what you said along those lines?

that he would never see his mother again (R. 138). This was denied by Gibbs and the other officers (R. 248, 261).²¹

Bennie Daniels likewise was arrested and made statements in regard to the murder (R. 230, 231). The officers testified that during his arrest and on the way to Williamston where he was also placed in jail, no one threatened him or used any violence against him. (See Sheriff Tyson's evidence, R. 230,

A. No threats were made to Lloyd Ray concerning the statement. Questioned him on where he was Saturday night and we had some other information and asked him why he sent his mother word to burn his clothes before the cops got them.

Q. You stated you were in an automobile and didn't strike the petitioner, Lloyd Ray Daniels, or make any threats?

A. No, sir.

Q. Did you put your hand on your pistol?

A. No, sir, I didn't. After we started questioning him he said he might as well go ahead and tell us the truth about it. Then he told us that Saturday night around eight-thirty—

Q. Anybody strike or slap him or any effort made to intimidate him by force?

A. No, sir.

Q. Bennie said you and others went upstairs in the jail and that you struck him or knocked him down, knocked him sideways?

A. Best I recall I didn't go to the jail at all when we went back the last time.

Q. Did you at any time while you were down there that night, whether upstairs or down, strike him?

A. No.

Q. Did you threaten him in any way or hold out hope to him that he ought to make a statement, that it might be lighter, or coerce him in any way?

A. No, sir.

All of the officers present when petitioner, Lloyd Ray Daniels, was arrested and who were present when he signed his confession, testified that no coercion or brutality in any form whatsoever was used to procure the confessions (R. 227, 228, 241-272).

²¹Since the decision of this Court in *HARRIS v. SOUTH CAROLINA*, 338 U. S. 68, 69 S. Ct. 1354, petitioners and defendants, trying to avoid the consequences of confessions, have exhibited an undue amount of maternal love. In the *HARRIS* case, the petitioner was not allowed to consult with his family and friends and was interrogated for a long period of time. The sheriff threatened to arrest

231; evidence of Roy Peel, R. 236, 237; evidence of Ray Smith, R. 240, 241, 271; evidence of highway patrolman Gibbs, R. 244, 245; evidence of Captain S. B. Dorsey, R. 250, 251). Bennie Daniels contended on the Federal hearing (R. 150, 151) that Captain L. D. Page had knocked him down in the cell, and when all of the officers present were asked to stand up, he identified Captain Page as the man who knocked him against the cell bars (R. 151). Now let us call the attention of the Court to the fact that when the matter was heard at the State trial, Bennie Daniels could not identify any man present as being the officer who struck him. He specifically said at the State trial that Captain Page did not strike him.²²

The petitioners signed certain written confessions in the jail at Williamston. The officers testified that no threats, physical violence or inducement or any other methods of coercion were used to obtain these confessions (See R. 273-276 for confessions). About an hour and a half was consumed

the petitioner's mother for handling stolen property, whereupon, the petitioner replied: "Don't get my mother mixed up in it. I will tell the truth," and then made the confession which was held to be invalid. The Court will see in another case which is presently before the Court for argument (BROWN v. ALLEN, No. 620) that this same plan of wanting to see his mother is attempted for the purpose of avoiding a confession he made. Lloyd Ray Daniels did not remember on the State trial that he had asked to see his mother when he was in jail at Williamston, yet a year and a half later on the Federal hearing, so he says, he asked to see his mother when he was in the jail at Williamston. It is plain that petitioners are very willing to cut their evidential cloth to fit the constitutional pattern of cases previously decided by this Court.

²²Bennie Daniels testified at the State trial as to this episode (R. 261):

"Q. BY THE COURT: Who was in there when you say they slapped you?

A. That fellow sitting yonder.

Q. BY THE COURT: Mr. Gibbs?

A. Yes, sir, and that man sitting yonder.

Q. BY THE COURT: Chief Page?

A. Yes, sir.

Q. BY THE COURT: Was he the one that slapped you?

A. No, sir.

Q. BY THE COURT: They were in there when you were slapped?"

in talking with the petitioners and in writing up the confessions. The testimony of the officers as to the confessions that were written up and signed at the jail will be found as follows: Sheriff Tyson, R. 232, 233, 258; Roy Peel, R. 236, 237; Captain L. D. Page, R. 238, 239, 267, 268, 269; S. G. Gibbs, R. 245, 246, 263, 264; L. E. Manning, R. 248, 249; Oscar Arnold, shorthand reporter, R. 252-254, 270. We cannot quote all of this testimony, but the Court will see that these officers absolutely denied that they used any brutality or any methods of coercion in procuring these confessions, but, to the contrary, the prisoners talked freely and voluntarily. The Court will further see that in many other instances, the petitioners talked about the crime, and it is not even contended by the petitioners that these conversations were attended with any violence and coercion. For example, on R. 233, it will be seen that the Sheriff and officers Dorsey and Manning brought the petitioners from Raleigh to Wilson on the way to Greenville when they were to be tried. The Sheriff took the clothes that the petitioners had on when the murder occurred, and they stopped on the highway, and each one pointed out the clothes he had on at the time, and "both very freely admitted the crime that had been committed. Told us what had happened. Both cried about it." On R. 252, it will be found that when the petitioners were being brought from the State Hospital at Goldsboro to Greenville, officers Dorsey and Manning being in the car, Bennie Daniels said that he was sorry that he killed O'Neal; but Lloyd Ray Daniels had nothing to say about the matter. Other instances could be given.

It is one of the contentions of the petitioners that they were

We find, therefore, that petitioner, Bennie Daniels, could not identify any of the officers present on the State trial as having been the one who struck him, and he specifically said that Captain Page did not strike him. Yet, contrary to all human experience and after the passage of some seventeen months, he identified Captain Page as being the man who struck him. It is plain that petitioners' evidence cannot be relied upon as to any detail, and their testimony is replete with instances where they have contradicted themselves (see cross-examination of Lloyd Ray Daniels, F. Tr. 134ff). At the Federal hearing, Lloyd Ray Daniels testified that the pistol of officer Gibbs was a black color (F. Tr. 145), if the Court will examine his evidence at the State trial, it will find that he testified that the pistol was a nickel or silver color.

unlawfully detained contrary to the criminal procedure and criminal code of North Carolina. The petitioners had, however, been arrested on a felony charge for murder. The Sheriff had told Bennie Daniels' father about the arrest (R. 231). The officers had information that Lloyd Ray Daniels had sent word to his mother to burn his bloody clothes before the officers found them (F.Tr. 262), and upon this basis, the officers had a right to arrest the petitioners without a warrant (G.S. 15-41: Appendix p. 52; see also G.S. 15-42: Appendix p. 53). It is also true that under the North Carolina statute (G. S. 15-47: Appendix p. 53), the State officers are required to permit persons arrested to communicate with counsel and friends immediately, but the petitioners having been arrested on a charge of a capital felony, the provisions of the State statute with reference to bail were not applicable, and as this statute has been construed by the Supreme Court of North Carolina, unless a request is made to communicate with friends and counsel, the statute is not applicable. The officers testified that no request had been made to this effect by the petitioners.²³

Since the officers who arrested the petitioners deny that there was any coercion or physical violence or that the confessions were extorted in any unconstitutional manner and

²³In *STATE v. EXUM*, 213 N.C. 16, 195 S. E. 7, G. S. 15-47 was construed in a capital case, and the Supreme Court of North Carolina said:

"The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

"There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

"Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

there is a conflict of testimony, this Court does not consider the question on its merits, and the finding of the State court being supported by substantial evidence is allowed to stand.²⁴ The mere questioning of a suspect while in the custody of police officers (*GALLEGOS v. NEBRASKA*, No. 94, October Term, 1951; *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481) is not prohibited by common law or by the due process clause of the Federal Constitution. We insist, therefore, that under the rulings of this Court, the confessions cannot be disturbed, and no constitutional rights of the petitioners have been violated.

When petitioner, Lloyd Ray Daniels, was at the State Hospital at Goldsboro, he was visited by a white man who had known him for eight or ten years. Petitioner, Lloyd Ray Daniels, told this white man about how they murdered O'Neal. The white man asked G. M. Johnson, a social worker at the Hospital, to sit in on the interview and have Lloyd Ray Daniels repeat what he had already told as to the murder. There certainly was no coercion, threats or physical force used in this interview, and none has ever been shown. It should be pointed out that the State only learned of this confession during the hearing held on the habeas corpus at Tarboro, North Carolina. This confession was, therefore, not used at the trial. This full confession will be found beginning at the bottom of the page at R. 97 and extending through R. 99. We ask the Court to read this confession which is free from attack, and which conclusively shows that these petitioners committed the murder just as they had previously said and related in their former confessions which are under attack in this case.

V.

THE INSTRUCTIONS OF THE TRIAL JUDGE TO THE JURY DID NOT DEPRIVE THE PETITIONERS OF ANY CONSTITUTIONAL RIGHTS.

The petitioners quote an excerpt from the instructions of the trial court to the jury in this case dealing with the ques-

²⁴*WATTS v. INDIANA*, 338 U. S. 49, 93 L. ed. 1801, 1804.

LYONS v. OKLAHOMA, 322 U. S. 596, 88 L. ed. 1481.

LISENBA v. CALIFORNIA, 314 U. S. 219, 86 L. ed. 166.

tion of the voluntariness of the confessions (petitioners' brief p.); 4 S.Tr. 642). We have already explained that in North Carolina the trial judge, upon a preliminary hearing, in the absence of the jury, determines whether confessions were freely and voluntarily made and should be admitted in evidence or excluded. Having determined that the confessions were admissible, it was the province of the jury to determine what weight, if any, should be given to the confessions, that is, to this sort of evidence. This is the practice which is followed by some eleven or twelve other State jurisdictions of this Nation. If the petitioners are allowed to challenge the conditions upon which the confessions were obtained and are given a fair hearing before the judge with the opportunity to offer witnesses and controvert the position of the State, then we think we have already shown that under the decisions of this Court, the conditions of the due process clause of the Federal Constitution have been met.

Now, it is plain to see that the reasons or underlying causes of the instructions of the court must have been the argument of counsel to the jury that these confessions had been procured under conditions that made them involuntary. In this connection, the court said in the instruction: "*With respect to the statements referred to in the alleged confessions there has been some argument about whether or not they were made freely and voluntarily.*" (Emphasis supplied). The judge, therefore, told the jury that it was the province of the court to determine this question. Naturally, these arguments must have provoked in the jury's mind some uncertainty as to whether the judge would determine that question or whether the jury would determine the question. The Supreme Court of North Carolina has passed on this precise question and has held that in our jurisdiction, these instructions are proper.²⁵

²⁵In *STATE v. FAIN*, 216 N. C. 157, 4 S. E. (2d) 319, on this identical question, the Supreme Court of North Carolina said:

"The second exception is directed to the court's comment upon the defendant's confession as evidence, namely, 'which the court has held to be competent in this case because it appears that the confession was taken without hope of reward or without any extortion or fear, and that it was fairly taken after the prisoner had been

It should be noted further that the court fully explained to the jury that in all of the evidence, the jury would determine what weight and credibility would be given to the testimony of a witness. Furthermore, in the excerpt of the instructions complained about by the petitioners, the court told the jury, as to the confessions, that he had determined that they had been made freely and voluntarily and were competent in evidence: "But you (the jury) are the sole judges of the weight to be given them and the credit to be given them." The court furthermore instructed the jury (4 S.Tr. 676):

"In arriving at your verdict you should weigh all of the evidence in every way, and in doing so you have the right to take into consideration the interest a witness has in your verdict, if any, their conduct on the witness stand, their demeanor, their interest, or bias, if any, and the means they have of knowing the facts to which they professed to testify, and their character and reputation. You should so weigh their testimony in arriving at a verdict which finds the truth, and not otherwise. It is your province to determine what weight and credibility you will give to the testimony of the witness, or any of them, the weight and reasonableness of it. You may find, if you think proper to do so, that a witness or some of the witnesses, have told the truth about parts of an occurrence and have not told the truth about other parts, or you may find one witness has told the truth about one part of a transaction and that another witness has told the truth about another part of it; and you are not controlled by the greater or smaller number of witnesses testifying one way or the other.

"It is for you to find the facts, giving to the testimony of the witnesses such credit as you think it is entitled to receive; and it is your province to draw such inferences from the testimony as you think it will properly bear in order to aid you in arriving at the facts in the case."

The petitioners cite, in support of their position, the cases of *CHRISTOFFEL v. UNITED STATES*, 338 U. S. 84, 93 L. ed. 1826 and *KONDA v. UNITED STATES*, 7 Cir., 166 F. 91.

duly warned of his rights.' This did not constitute an expression of opinion, such as is prohibited by C. S., 564, for the judge said no more than that the confession had been duly admitted in evidence, and he gave the reasons for admitting it. In this respect, the case of *S. v. DAVIS*, 63 N. C., 578, would seem to be 'straight up and down' with the instant case."

There is nothing in these cases that supports the petitioners' position. The trials in these cases originated in the district courts, they were Federal cases entirely and do not purport to pass upon the instructions of trial judges in State courts when such instructions are brought under review for constitutional reasons. The case of *PALCO v. CONNECTICUT*, 302 U. S. 319, 82 L. ed. 288 dealt with the question of double jeopardy where a State statute permitted the State to appeal in criminal cases. It was held that this was not an infringement of the due process clause of the Fourteenth Amendment. The case did not deal in any aspect with a constitutional review of the instructions of a State trial judge to a jury. The case of *BUCHALTER v. NEW YORK*, 319 U. S. 427, 87 L. ed. 1492 is authority for the respondent's position in this case. The petitioners in the *BUCHALTER* case contended that rulings on evidence and the instructions to the jury precluded a fair trial. The Court of Appeals of New York said some of the rulings and instructions were erroneous, but that they were not substantial and did not affect the ability of the jury to render an impartial verdict. In disposing of the constitutional contention, this Court said:

"As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law."

This Court has held many times that it will not review this type of State action and that no questions are raised under the Fourteenth Amendment.²⁶ The case of *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481 deals with a State practice where the judge determines the voluntary character of the confession as a preliminary matter and then submits the confession to the jury with an instruction that it must be carefully scrutinized and received with great caution by the jury and rejected if obtained by punishment, intimidation or

²⁶*DAVIS v. TEXAS*, 139 U. S. 651, 35 L. ed. 300; *HOWARD v. KENTUCKY*, 200 U. S. 164, 50 L. ed. 421; *MILLER v. TEXAS*, 153 U. S. 535, 38 L. ed. 812; *CARTER v. ILLINOIS*, 329 U. S. 173, 91 L. ed. 172; *BUCHALTER v. NEW YORK*, 319 U. S. 427, 87 L. ed. 1492; *SNYDER v. MASSACHUSETTS*, 291 U. S. 97, 78 L. ed. 674; *CHAPLINSKY v. NEW HAMPSHIRE*, 315 U. S. 568, 86 L. ed. 1031.

threats. This is the State practice in Oklahoma, and this Court stated that when the instruction fairly raised the question of whether or not the challenged confession was voluntary, the requirements of due process were satisfied. This Court further stated: "The Fourteenth Amendment does not provide review of mere errors in jury verdicts, even though the error concerns the voluntary character of a confession."

VI.

THE PETITIONERS, BY THEIR OWN LACHES AND INEPTNESS, HAVING FAILED TO MEET THE CONDITIONS APPLICABLE TO ALL PERSONS UNDER WHICH APPEALS ARE ALLOWED TO THE SUPREME COURT OF NORTH CAROLINA AND HAVING FAILED TO PERFECT THEIR APPEAL, NO CONSTITUTIONAL QUESTION IS PRESENTED AS TO ANY DEPRIVATION OF THE RIGHT TO APPEAL.

On this point, petitioners make the most far-fetched and legally exotic argument of their whole brief. Although the State, not any officer of the State, did anything to hinder the petitioners from perfecting their appeal to the Supreme Court of North Carolina, it is now said that the State of North Carolina has denied the petitioners the right of appeal. Although the conditions upon which an appeal is granted in the State of North Carolina are applicable to all persons, whether white or colored, and although the petitioners failed to meet these conditions, they still say that they should have been allowed an appeal irrespective of their own laches and ineptness in this matter. In other words, it comes to this: the petitioners claim special privileges and discriminations in their favor on this point, they are asking for more than equality.

The statutes of North Carolina regulating appeals (Appendix: pp. 47, 48) fix the number of days for service of case on appeal and counter case or objections by the prosecution. This time can be enlarged by consent and was done so in this case. The petitioners were allowed (R. 277) sixty days in which to serve their case on appeal, and the State was allowed forty-five days to serve objections or counter case. This time dated from June 6, 1949. Statement of case on appeal was left in the solicitor's office with his secretary on August 6, 1949, and

counsel for petitioners admitted it was not within the sixty days allowed by the court. The service of the case on appeal by leaving it with the secretary of the prosecuting officer, had it been in time, would have been proper if counsel for the petitioners had secured an officer authorized to serve process to leave the case on appeal at the solicitor's office and make a return (CUMMINGS v. HOFFMAN, 113 N. C. 267, 18 S. E. 170; STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2). The petitioners' counsel complained that the court reporter had been slow in furnishing him with a copy of the transcript of evidence and that counsel for the petitioners had been subjected to "a great press of business in the courts and elsewhere on other matters."

The petitioners in the meantime had filed an application to the Supreme Court of North Carolina for certiorari, one application being filed on September 27, 1949, and a supplementary application having been filed on October 10, 1949. In the meantime, Judge Williams had heard the matter on the solicitor's motion to strike out the case on appeal and on October 1, 1949, issued an order striking out the appeal (R. 277). In denying the application for certiorari (STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2), the Supreme Court pointed out that the pressing duties of attorneys in other matters and places was not important but that there was nothing more important and pressing at the time than diligence in perfecting their clients' appeal. The Supreme Court further pointed out that rules requiring service to be made of case on appeal within allotted time are mandatory. Counsel for petitioners on this point imply that this is the first case in which the Supreme Court of North Carolina has denied certiorari in a capital case. The implication, of course, is not correct for certioraris have been denied in such cases in many instances.²⁷

²⁷STATE v. WESCOTT, 220 N. C. 439, 17 S. E. (2d) 507
 STATE v. MOORE, 210 N. C. 686, 188 S. E. 421
 STATE v. CROWDER, 195 N. C. 335, 142 S. E. 222
 STATE v. BUTNER, 185 N. C. 731, 117 S. E. 783

The first two cases above cited in which certioraris were denied are capital cases involving the sentence of death. In the WESCOTT case, *supra*, the same contention was made that the stenographer's transcript of the evidence had not been obtained. The court pointed

We believe that we could find many more instances of denial in capital cases if time for research were available. The petitioners do not contend, and indeed they could not show, that the Supreme Court of North Carolina grants certioraris for white applicants in capital cases but denies certioraris when they are sought by colored applicants. The Supreme Court of North Carolina has only followed what the petitioners think is a harsh rule, and that is, when a lawyer undertakes to prosecute an appeal to the Supreme Court of North Carolina in a capital case, he should look after that business. The petitioners themselves are to blame for their own situation and fully knowing their own blame and negligence, they undertake to condemn the State of North Carolina by saying that the State has acted in a discriminatory manner. We undertake to say that the counsel first appointed for the petitioners in this case knew how to perfect appeals to the Supreme Court of North Carolina. It was never at any time essential for the petitioners to have a stenographer's transcript of the evidence. Attorneys in North Carolina have made it a constant practice, where the transcript of evidence is not available and time is running short, to state the evidence in the case on appeal from memory and then serve the case on appeal on the prosecuting officer in apt time, and then the case is properly settled when the transcript is available, and in the meantime, the appellant has preserved his rights.

The petitioners cite the cases of *DOWD v. UNITED STATES EX REL. COOK*, 340 U. S. 206, 95 L. ed. 215 and *COCHRAN v. KANSAS*, 316 U. S. 255, 86 L. ed. 1453. These cases do not have the remotest application or relevance to the situation now before the court. Both of these cases deal with situations where the officials and agents of State Penitentiaries retained and prevented appeal papers from leaving the penitentiaries involved and thus prevented the petitioners in question from perfecting their appeals. Of course, if the State or one of its officers interferes and prevents the perfection of an appeal by such unjust and unfair action, then

out that in former times, there were few court reporters, and a stenographer's report of a trial was usually not obtainable in preparing and settling cases on appeal. The court further pointed out: "The stenographer's notes are not the compelling and supreme authority as to what transpired during the trial."

the petitioner in such an action should have his rights presented and passed on. This is in accord with the thinking of any fair-minded person. We submit, therefore, that no constitutional question is raised on this point.

VII.

PETITIONERS FAILED TO EXHAUST THE AVAILABLE REMEDY OF APPEAL IN THE STATE COURT BY FAILURE TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF THE STATE WHICH COULD HAVE REVIEWED ALL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS IN THEIR TRIAL; THEREFORE, PETITIONERS ARE PROHIBITED BY 28 U.S.C., § 2254 FROM USING THE PROCESS OF A FEDERAL HABEAS CORPUS AS A COLLATERAL ATTACK UPON A JUDGMENT IN A STATE COURT IN A CRIMINAL TRIAL OR AS A SUBSTITUTE FOR AN APPEAL.

We quote 28 U.S.C., § 2254, as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Petitioners failed to serve statement of case on appeal within the time required by State law, and the trial judge struck out the case on appeal by order after hearing. (See Order, R. 277). See *STATE v. DANIELS*, 231 N. C. 17, 56 S. E. (2d) 2. In North Carolina, petitioners had an unconditioned right (§ 15-180 of the General Statutes) to appeal to the Supreme Court. The Supreme Court of North Carolina reviews constitutional questions relating to racial discrimination in the composition of grand juries and petit juries (*STATE v.*

SPELLER, 229 N. C. 67, 47 S. E. (2d) 537; STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814), and issues as to the constitutionality of the admission of confessions (STATE v. BROWN, 231 N. C. 152, 56 S. E. (2d) 441; STATE v. BROWN, 233 N. C. 202, 63 S. E. (2d) 99) are passed on by the Supreme Court. For other State cases on jury discrimination and confessions, see appellee's brief C.C.A. 4, No. 6330, p. 10. Petitioners' remedy by appeal was adequate, and petitioners' counsel—who were also counsel for Speller and obtained two new trials in that case—knew how to perfect appeals to the Supreme Court of North Carolina. See STATE v. SPELLER, 229 N. C. 67, 47 S. E. (2d) 537; STATE v. SPELLER, 230 N. C. 345, 53 S. E. (2d) 294.

It is admitted that there have been cases of exceptional circumstances of peculiar urgency (MOORE v. DEMPSEY, 261 U. S. 86, 67 L. ed. 543) where adequate process existed but was ineffective to protect the rights of prisoners. The right of appeal—no matter how adequate and comprehensive the scope of review—would be a legal chimera without the guiding hand of counsel (WILLIAMS v. KAISER, 323 U. S. 471, 89 L. ed 398) to render the appeal effective. None of these exceptions exists in the present case unless the principle is adopted that exceptional circumstances exist justifying the issuance of habeas corpus in all cases of prisoners sentenced to death. We do not believe such a rule exists, but if it does, then such logic approaches the limits of Federal review of all cases where persons are sentenced to death in State courts.

Petitioners contend that "there is presently not available to petitioners any remedy or procedure in the aforesaid state courts," and they are, therefore, entitled to relief in the Federal courts. In other words, any petitioner, where he has available an adequate review upon conditions fixed by the State, can fail to meet these conditions or simply wait until time limitations expire and then say his present status as to exhaustion of remedies must prevail. He need not go to the trouble and expense of an available appeal; all he has to do is to fail to perfect the appeal for any reason.²⁸ It is true that petitioners were only one day late in serving statement

²⁸This view of the matter was discussed in the case of BARTON v. SMITH, 9 Cir., 162 F. (2d) 350, where the Court said:

of case on appeal, but the time element does not answer the question. The State fixes the same appeal procedures for all people of all races, and the fact that petitioners belong to the colored race does not give them preferential treatment in appeals or discriminations in their favor. The time factor in perfecting appeals in nearly all States is a fixed measure and is not governed by approximations or a process of relativity. To adopt the "presently available remedy" theory of counsel for petitioners would completely destroy Title 28, U.S.C., § 2254, and would be an evasion of its plain words.

After this Court denied certiorari (October Term, 1949, No. 412, Misc.), petitioners applied to the Supreme Court of North Carolina for another writ of error coram nobis (*STATE v. DANIELS*, 232 N. C. 196, 59 S. E. (2d) 430) which was dismissed. The petitioners should then have applied to this Court for a certiorari, and this is another instance of failing to exhaust an available remedy. If application had been made to this Court for certiorari, then irrespective of a decision on a non-Federal question—it being then known that coram nobis was not available—this Court would have had an opportunity to say whether or not North Carolina had furnished petitioners sufficient effective process. This fact was noted by the Circuit Court of Appeals (*DANIELS v. ALLEN*, 4 Cir., 192 F. (2d) 763) for the opinion states: "No application for certiorari was made to the Supreme Court of the United States to review this decision" (second coram nobis decision). In a footnote to this opinion (C.C.A. 4), the Court said:

"It (Supreme Court of North Carolina) had before it the fact that the question (jury discrimination) had been raised in this case; for the record shows that the case on appeal which had been stricken by the trial judge was attached to the application made for certiorari to bring it up as a part of the record."

While it is stated in the opinion of the court below (C.C.A. 4) that the question is not one of exhausting State remedies

"It is putting a premium upon negligence and inaction to permit a prisoner to sit idly by and lose his state remedies through lapse of time, and then apply for habeas corpus in a Federal court. An inmate of a state prison can thus force jurisdiction upon a Federal court, by the simple expedient of sleeping on his right to seek the aid of a state forum."

as a prerequisite to the writ, but it is the use of habeas corpus in lieu of an appeal; it is pointed out that to allow such a substitute of an appeal would permit a lower Federal court to review decisions of a State court of coordinate jurisdiction instead of requiring the orderly process of appeal to the Supreme Court of the State with application to the Supreme Court of the United States for certiorari be followed. The right of reviews was provided by State practice and was lost by failure to comply with the reasonable rules of the State court, which cannot be invalidated or waived by the Federal courts.

The petitioners cite and rely upon an article in Harvard Law Review (61 Harvard Law Review 657—The Freedom Writ). As to exhaustion of remedies, we desire to rely upon the same article, and we quote (p. 666):

“‘Exhaustion’ may, however, connote a more extreme requirement than that of no other presently available remedy. It may mean that federal habeas corpus is not to issue unless the petitioner invoked within the proper time every remedy which was ever available to him, even though such untried remedies are no longer available. This application of the exhaustion principle may find justification in the theory that there has been no Fifth or Fourteenth Amendment due process denial when available federal or state processes were not invoked. There are court indications that ‘exhaustion’ has the extreme meaning here suggested. In the *Sunal* case (*Sunal v. Large*, 332 U. S. 174, 91 L. ed. 1982), the court discussion of ‘exceptional circumstances’ indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, though appeal was no longer available.” (Parenthetical matter ours—footnotes not quoted).

It appears that Title 28, U.S.C., § 2254, is but a statutory expression of the rationale of previously decided cases on this subject. Judge Parker who wrote the opinion of the court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171) states:

“The provisions of the Revised Code with respect to Habeas Corpus are very largely a mere codification of the best practice already worked out by Court decisions.”

Title 28, U.S.C., § 2254, became effective June 25, 1948; the case of *YOUNG v. RAGEN*, 337 U. S. 235, 93 L. ed. 1333, was decided June 6, 1949, and this Court in footnote 1 states:

"Existing law as declared by *Ex Parte Hawk* was made a part of the statute by the new judicial code 28 U.S.C. 1948 ed. Sec. 2254. * * *"

This point—failure to exhaust an adequate appeal—has been already decided against petitioners.

SUNAL v. LARGE, 332 U.S. 174, 91 L.ed. 1982

RIDDLE v. DYCHE, 262 U.S. 333, 67 L.ed. 1009

EX PARTE HAWK, 321 U.S. 114, 88 L.ed. 572

GLASGOW v. MOYER, 225 U.S. 420, 56 L.ed. 1147

WOOLSEY v. BEST, 299 U.S. 1, 81 L.ed. 3

YOUNG v. RAGEN, 337 U.S. 235, 93 L.ed. 1333

GOTO v. LANE, 265 U.S. 393, 68 L.ed. 1070

DARR v. BURFORD, 339 U.S. 200, 94 L.ed. 761; Anno. 94 L.ed. 785

In the case of *GOTO v. LANE*, 265 U. S. 393, 68 L. ed. 1070, the court had before it an appeal from a judgment of the District Court of Hawaii refusing a writ of habeas corpus sought by thirteen persons convicted in a territorial Circuit Court. They attempted to raise certain constitutional questions about the indictment and other particulars. It appears, however, that the petitioners could have sought a review on a writ of error and could have had these same questions reviewed by an appellate court but that they allowed their time to expire and thereby lost the opportunity to resort to this remedy. In disposing of the question and affirming the dismissal of the habeas corpus, the Supreme Court of the United States said:

"This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was

not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, 5 L. ed. 787, 788; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152) but subject to correction in regular course on writ of error. *If the questions presented involved the application of constitutional principles, that alone did not alter the rule.* Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. *And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute.* Riddle v. Dyche, 262 U. S. 333, 67 L. ed. 1009, 43 Sup. Ct. Rep. 555. And see Craig v. Hecht, 263 U. S. 255, ante, 293, 44 Sup. Ct. Rep. 103." (Emphasis supplied)

The case of GOTO v. LANE, *supra*, has been cited and approved various times by the Supreme Court of the United States, the latest reference appearing in the case of SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982. The case is also approved by a Circuit Court of Appeals in the case of BIDDLE v. HAYES, 8 Cir., 8 Fed. (2d) 937. The same case has also been approved in the case of U. S. EX REL. GEISE v. CHAMBERLAIN, 7 Cir., 184 F. (2d) 404 (Adv. Op. No. 4 in Federal Report).

SANDERLIN v. SMYTH, 138 F. (2d) 729, 730 (C.C.A. 4)

U. S. EX REL. FEELEY v. RAGEN, 166 F. (2d) 976,

981 (C.C.A. 7)

MARKUSON v. BOUCHER, 175 U. S. 184, 185

Finally, it is contended by petitioners that they attempted to appeal, and, therefore, they have met the conditions of the statute (Title 28, U.S.C., § 2254) and have exhausted their remedy of appeal. There is implicit in this contention a claim of substantial compliance. This is a bizzare and strange contention in view of the language of the statute. The language is written in the past tense "has exhausted," which contemplates completed action. The concept of "exhaustion" is "to bring out or develop completely." The fact remains that the statute does not deal with approximations or attempts. The statute itself is a full answer to such a contention.

We assert that since the enactment of Title 28, U.S.C., § 2254, petitioners have no standing in the Federal courts on habeas corpus unless State appeal is exhausted or unusual circumstances of peculiar urgency are shown.

The cases cited by petitioners as justifying habeas corpus without exhaustion of appellate remedies are either cases that originated in the Federal courts or the court originally had no jurisdiction over the person or subject matter, or exceeded its authority in rendering judgment. Assuming that jury discrimination and the validity of the admission of confessions can be reviewed by Federal habeas corpus, then the question is not one of power but how the power can be exercised. The petitioners' long discussion of the history of habeas corpus does not help us any since the revision and enactment of 28 U.S.C., § 2254. This statutory provision on how Federal habeas corpus can be made effective and the conditions for its use as construed in the cases of *EX PARTE HAWK*, *supra*, and *DARR v. BURFORD*, *supra*, determine the question. Chief Judge Parker, of the Fourth Circuit, who wrote the opinion of the court below (*DANIELS v. ALLEN*, 192 F. (2d) 763), beginning on p. 767, gives the reason why the writ should not have been issued in this case. He quoted from *SANDERLIN v. SMYTH*, 4 Cir., 138 F. (2d) 729 in which it is stated that the writ cannot be used (1) as a substitute for an appeal or writ of error; (2) unless it is made to appear that there is a lack of adequate remedy in the State courts and (3) there must be a gross violation of constitutional rights plus exhaustion of State remedies or no available adequate remedy through lack of State provision or exceptional circumstances. The District Court, in this case, did not make any express findings of fact or conclusions of law on the precise question of whether exceptional circumstances existed. It is submitted that the opinion below in the Fourth Circuit holds that exceptional circumstances do not exist in this case. It seems to us that the present status of Federal review of State action by Federal habeas corpus is that unless the petitioner has exhausted his remedies provided by the State, he is not entitled to review on Federal habeas corpus unless exceptional circumstances exist. The absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner are, but general statutory definitions of the situation, when exceptional circumstances may exist. That this is the correct interpretation of the Federal statute, see *GOODMAN*

v. LAINSON, 8 Cir., 182 F. (2d) 814 and PLAINE v. BURFORD, 10 Cir., 180 F. (2d) 724.

The case of U. S. EX REL. AULD v. WARDEN OF NEW JERSEY STATE PENITENTIARY, 187 F. (2d) 615 is greatly relied upon by petitioners. This case does state that a sentence of death plus the absence of the right to review by habeas corpus in the New Jersey Courts would constitute extraordinary circumstances, and the writer of the opinion further states that there are decisions of this Court to sustain his view, but he does not cite the cases. This discussion is plainly collateral to the primary point in the case because the court disposed of the case on the merits and decided that Auld was not entitled to the writ of habeas corpus. The concurring opinion of Circuit Judge Hastie calls attention to the fact that there was no need of passing upon the problem of extraordinary circumstances.

VIII.

PETITIONERS CANNOT USE HABEAS CORPUS AS A SUBSTITUTE FOR AN APPEAL.

The principle stated above is an old principle, but it is supported by many cases. It is perfectly plain from the record in this case that the petitioners having failed to perfect their appeal are simply trying now to use the writ of habeas corpus as a substitute for the appeal which they could have had but lost through their own negligence. Because constitutional questions are raised in a State court in a criminal trial, this does not, within itself, warrant the review of such questions on habeas corpus. See EURY v. HUFF, 141 F. (2d) 554, 555, C.C.A. 4; GLASGOW v. MOYER, 225 U. S. 420, 56 L. ed. 1147; GRAHAM v. SQUIER, 132 F. (2d) 681, C.C.A. 9.

CONCLUSION

The record in this case justifies the conclusion that the petitioners murdered their victim in a cruel, horrible and savage manner, and they themselves admit that they committed this murder. Their admission is corroborated by other facts and circumstances. In interpreting the Constitution of the United States, Federal statutes and State laws, and in balancing the rights of the parties, we ask the Court to consider the claims of the victim of this murder.

Respectfully submitted,

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APPENDIX

Chapter 1, General Statutes of North Carolina:

§ 1-279. *When appeal taken, stay of execution.*—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

§ 1-282. *Case on appeal; statement, service, and return.*—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exceptions on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within 15 days from the entry of the appeal taken; within 10 days after such service the respondent shall return a copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

§ 1-283. *Settlement of case on appeal.*—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than fifteen days after the respondent serves his counter case, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counter case or exceptions to the judge, then the exceptions filed by the respondent shall be allowed; or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial districts, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it.

Chapter 15, General Statutes of North Carolina:

§ 15-180. *Appeal by defendant to supreme court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.

Chapter 9, General Statutes of North Carolina:

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and

every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more

than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral di-

rectors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specific day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he

shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

Chapter 14, General Statutes of North Carolina:

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.

Chapter 15, General Statutes of North Carolina:

§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.

Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.